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February 2, 2021

Hon. Loretta A. Preska
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York
Via ECF

Re: United States v. Donziger, No. 19-cr-561 (LAP), 11-civ-691 (LAK)

Dear Judge Preska:

Please accept this request to cease the Court's referring to the Seward & Kissel firm as the "government," given that the firm is prosecuting this case in its private capacity, is being paid by the hour from taxpayer funds, and was appointed by Judge Kaplan to prosecute Judge Kaplan's own criminal charges against Mr. Donziger. I respectfully ask that the Court revert to its earlier practice of referring to the Seward & Kissel firm as the "Special Prosecutor" rather than the Government.

Since I filed my notice of appearance, this Court issued two opinions last year (Dkts. 237, 219) which used the designation "Special Prosecutor." Subsequently, this year, in another brace of opinions, (Dkts. 243 and 242), this Court used the designation "Government."

As this Court appeared to recognize last year, Seward and Kissel is not "the Government." Rule 42(a)(2) makes the distinction between "an attorney for the government" and "another attorney" clear:

(2) *Appointing a Prosecutor.* The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt.

Thus, private prosecutors are, by the text of the rule that created them, not attorneys for the government and should not be deemed as such. To do otherwise would amount to an inappropriate co-optation of the inherent credibility and accountability of the government and paste it onto a private, for-profit prosecutor, accountable to no one except, perhaps, Judge Kaplan.

In Young v. United States ex rel. Vuitton Et Fils S.A., 107 S.Ct. 2124 (2006), the leading case of private prosecutors, the Court referred to the private prosecutor as “Special Prosecutor.” Throughout the lower court proceedings in the S.D.N.Y. and the Second Circuit, the same denomination was used. E.g., Young v. United States ex rel. Vuitton et Fils S.A., 780 F.2d 179 (2d Cir. 1987). Judge Kaplan’s Order, bestowing powers upon Seward & Kissel that are almost always reserved for the Government, does not make Seward & Kissel the Government.

This year has already featured far too many people draping themselves in flags and pretending to be the government. This Court need not create more by calling Seward & Kissel the “Government” when it is a private, for-profit law firm that had the company Mr. Donziger helped hold accountable in court for extensive pollution as a client.

Sincerely,

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Ronald L. Kubby